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No. 90-616

In The

Supreme Court of the United States

October Term, 1990

FRED RICE,

Petitioner,

vs.

JOHN AURIEMMA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether public officials already fully immunized by the Seventh Circuit for damage claims arising from decisions expressly acknowledged as efforts to engage in affirmative action need have the protections of official immunity further extended on the same rationale even to those personnel decisions which they deny were made for race-conscious and affirmative action reasons.

2. Whether dictum confirming prior consistent case law can clearly establish law for qualified immunity purposes.

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BRIEF IN OPPOSITION FOR RESPONDENTS

Respondent John Auriemma and his sixteen co-plaintiffs respectfully request this Court to deny petitioner Rice's petition for writ of certiorari and expeditiously rule allowing this action to return to the district court for trial.

OPINIONS BELOW

The respondents have included two additional opinions and an order entering a jury verdict. The two opinions are from the district court. The magistrate's report and recommendation of September 20, 1985 to Judge Holderman is reprinted in full in Appendix C. The decision of Judge Holderman denying defendants' first motion for summary judgment in most respects is reprinted in Appendix D.

The minute order reprinted in Appendix B is the order entering the jury verdict in part against petitioner Rice on the race discrimination claims of plaintiffs O'Sullivan and Luchtenburg in the related case of *Maloney, et al. v. Rice, et al.*, Nos. 84 C 689 and 85 C 1905.

STATEMENT OF JURISDICTION

The order of the district court denying qualified immunity to petitioner Rice, a public official is appealable here pursuant to *Mitchell v. Forsyth,* 472 U.S. 511 (1985).

STATEMENT OF THE CASE

The misleading information and misrepresentations put forward by Rice in his petition provide little guidance to this Court regarding the course of the proceedings below. After committing himself to certain defenses early in the career of this eight-year old action, Rice recently needed to cast about for new defenses because the old ones failed him. To do so he has now contradicted himself and risked perjury before federal juries and judges. The immunity rulings of Judge Holderman as affirmed by the Seventh Circuit are based in a thorough knowledge of the intricacies of the facts disclosed by extensive discovery and the numerous motions Rice has filed supporting his defenses. Because of his

familiarity with the record, the district court had no doubt that Rice's new affirmative defense of affirmative actions was at odds with his previous deposition and trial testimony and in fact could not be supported by the record.

Following his appointment as Superintendent of the Chicago Police Department, petitioner Rice embarked on a course of demoting numerous whites from the top supervisory ranks of the Department. At least six actions were filed in the Northern District of Illinois arising from Rice's mass demotions. Except for one hispanic demotee, all the demotees were white and substantially all the whites were white males. No black was ever demoted. Numerous blacks were promoted. The six actions became grouped into two parts. These were the *Auriemma* case and the *Maloney* case. The two groups were consolidated for discovery purposes. Thousands of documents were produced and over seventy depositions were taken.

Initially and in fact for the first three years of litigation petitioner Rice's defenses were straightforward. He denied that he was ever motivated by race or ever acted out of any race consciousness (R52). He also argued that he had absolute discretion to assign Chicago Police Department personnel as he saw fit without regard to any prohibitions found in the First Amendment nor in the Equal Protection Clause of the Fourteenth Amendment (R12). Twice the district court ruled that Rice's personnel actions were subject to First Amendment and Fourteenth Amendment considerations. The first decision is reported at *Auriemma, et al. v. City of Chicago, et al.*, 601 F. Supp. 1080 (N.D. Ill. 1984). The second decision is found in Appendix D. Rice's absolute discretion defense has only been briefly raised since Judge Holderman's 1987 ruling.

From the first, Rice categorically denied he was conscious of the race of the plaintiff officers at the time he demoted them.

Race, according to Rice, was never a factor in his personnel decisions affecting plaintiffs and the other whites demoted (App. A, 1a). Rice never raised affirmative action as an affirmative defense in his answer (R52). He never pled, stated during discovery nor raised by motion any suggestion of affirmative action (R52, 57, 88). Rice's defense posture changed with two events. The first was a jury verdict finding him liable in August 1988 for race discrimination against two white officers he demoted, O'Sullivan and Luchtenburg (App. B, 4a). The second was the issuance of the Seventh Circuit's opinion in *Cygnar, et al. v. City of Chicago, et al.*, 865 F.2d 827 (7th Cir. 1989).

The jury verdict came in the trial of the *Maloney* litigation. The *Maloney* litigation was tried twice. The first trial ended on March 2, 1988 in a mistrial when Rice tried to change his defense and even admitted he had lied in other federal proceedings. The second trial ended in a verdict on August 8, 1988. The jury found Rice had discriminated against two of the four white plaintiffs when he demoted them because they were members of the white race (App. B, 4a). The second event was the issuance of the *Cygnar* opinion. In *Cygnar*, the Seventh Circuit accorded immunity to a Chicago official, Raleigh Mathis, who had made sweeping changes in the City's Office of Municipal Investigations. Mathis admitted at his trial that he was race conscious when he made mass reassignments of white male officers. He expressly raised at the time of the reassignments the lack of affirmative action concepts and the statistical disparity between whites and minorities in the office. *Cygnar* at 842-44. No such information was ever collected or reviewed by Rice at the time he demoted respondents.

Thus in early 1989 just prior to the trial date set for the *Auriemma* case, Rice shifted his defense and raised for the first time by summary judgment official immunity and affirmative action (R109). To lend credibility to the immunity defense,

petitioner Rice presented sketchy statistical information recently collected concerning the racial makeup of the Chicago Police Department (R105). The statistical racial data, however, was not assembled nor reviewed by Rice at the time he made the demotions but over five years later (R105). There is no reference in the statistics to the relevant labor pool.

One of the misrepresentations proffered by petitioner Rice in his Statement of the Case relates to his attempt to minimize the evidence found by Judge Holderman to support respondents' claims. On the chart Rice used to record his personnel changes he wrote "white" in front of a bracket enclosing a number of white male supervisors (R122, 69, 70). Judge Holderman stated in his order that the word "white" appeared "beside the names of certain police officers" as the exhibit plainly shows (App. D, 60a). Petitioner Rice represents that the word "white" appears in front of one officer's name. Any reliance on petitioner Rice's factual representations should be guarded.

The Seventh Circuit properly affirmed *en banc* the district court's denial of immunity to Rice.

REASONS FOR DENYING THE WRIT

I.

WHEN PUBLIC OFFICIALS ACKNOWLEDGE THEIR RACE-CONSCIOUS PERSONNEL DECISIONS ARE EFFORTS TO ENGAGE IN AFFIRMATIVE ACTION, THE SEVENTH CIRCUIT HAS UNHESITATINGLY IMMUNIZED THEM FROM DAMAGE CLAIMS, BUT IT HAS CORRECTLY REFUSED TO FURTHER EXTEND IMMUNITY TO THOSE OFFICIALS WHO DENY THAT THEIR PERSONNEL DECISIONS WERE MOTIVATED BY RACE AND FOR AFFIRMATIVE ACTION REASONS.

A. The Seventh Circuit Fully Immunizes Public Officials From Damage Claims When They Fully Acknowledge Their Race-Conscious Personnel Decisions Are Efforts To Engage In Affirmative Action.

No public official can doubt the Seventh Circuit's strong policy to immunize him or her when forthrightly engaged in affirmative action. In *Cygnar*, the Seventh Circuit thoroughly addressed the immunity issue. After discussing the key opinions from this Court, the Seventh Circuit concluded that governing affirmative actions law was not so clearly established as to prevent a public official from transferring employees based on their race "to correct what he perceived to be statistical underrepresentation of minorities" in the work place. *Cygnar* at 844.

The analysis in *Cygnar* is the same as employed by the Seventh Circuit in its *en banc* opinion on review here. The difference is that Mathis, the public official in *Cygnar*, acknowledged he was race conscious when he ordered his reassignments, whereas Rice denies it. It is simple logic that a public official can not propose to engage in affirmative action without first noting which among

his subordinates belong to different racial groups. It is a precondition to assembling racial statistics. Mathis admitted he did so. Rice denied any race consciousness and reviewed no racial statistics. The Seventh Circuit correctly refused to extend the rationale for granting immunity to Mathis any further to protect Rice.

The intent of public officials where immunity is the issue is not the murky concept Rice contends. In fact how a public officials' intent should be dealt with is adequately explained by the Seventh Circuit. Rice argued below that all intent must be extracted out of any qualified immunity analysis. In its opinion in *Rakovich v. Wade,* 850 F.2d 1180 (7th Cir. 1988) (*en banc*), the Seventh Circuit took full account of this Court's opinions in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) and *Anderson v. Creighton,* 483 U.S. 635 (1987). *Rakovich* decided after *Anderson,* specifically discusses how the objective standard of *Harlow* is to be employed in a case such as this where the plaintiff's claim depends on the state of mind of the defendant official. *Rakovich* does not hold as petitioner Rice argues that intent is irrelevant. Rather *Rakovich* cautions that it is a mistake to read *Harlow* too broadly. As the *Rakovich* court explained:

> The elimination of intent from the formula does not mean that the *Harlow* Court sought to limit civil rights actions to those where state of mind was *not* a part of the substantive law. *See* Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose of Civil Rights Litigation,* 95 Yale L.J. 126 (1985). *Harlow* merely states that intent must not be *evaluated or weighed* through a factual inquiry, which would reduce the likelihood that qualified immunity could be decided in a motion for summary judgment. *See Harlow,* 457 U.S. 818, 102 S.Ct. at 2738.

Id. at 1209-10. The Court then followed its time-honored and judicious approach to analyzing Rice's intent:

> Under *Harlow* the district court must conduct a two-part analysis: (1) does the alleged conduct set out a constitutional violation? and (2) were the constitutional standards clearly established as the time in question? . . . Intent is relevant to (1) but not to (2). *Wade v. Hegner,* 804 F.2d 67, 70 (7th Cir. 1986). Thus, under part (1) of this approach "plaintiffs' supported allegations are assumed true, including intent." *Id.* at 69 & n. 3 (emphasis added).

850 F.2d at 1210.

Respondents allege that Rice intended to discriminate against them for being white when making his demotions. Because Rice raises no defense that he intended to racial balance or accomplish affirmative action there is nothing more to add to the analysis. The only question left is whether the constitutional standards were clearly established in 1983. Because there can be no serious dispute that racially motivated demotions of whites absent an affirmative action defense was unlawful in 1983, Rice is not entitled to qualified immunity.

The Seventh Circuit's analysis announced in *Rakovich* and followed in *Cygnar* is fully consistent with *Harlow* and *Anderson*. Furthermore the Seventh Circuit's decision in *Cygnar* does not conflict with other Circuit's review of any affirmative action defense proffered by public officials. Such a review has been rare, for petitioner Rice can not provide the citation to another case analyzing a public official's immunity arising from an affirmative action defense.

B. The Seventh Circuit's Refusal To Extend Immunity To Public Officials Who Refuse To Adopt An Affirmative Action Defense Or Who Refuse To Even Acknowledge Their Personnel Decisions Were Race-Conscious Is Not At Odds With Any Reported Decision.

Petitioner Rice tries to draw this Court into an academic discussion. Rice contends that he is entitled to immunity on an affirmative action defense which he is precluded from pursuing because of his admissions. There is no question that on the facts as presently developed through extensive discovery, Rice cannot support at trial an affirmative action defense.

This Court has never extended immunity to an official for a defense from which by his own admission he is factually precluded. Petitioner Rice provides no lower court authority for such a dishonest result. To extend this eight-year litigation further to indulge Rice's clear invitation to engage in speculation of what potential defenses Rice might have had but for the real facts of his case little serves the development of official immunity law and will work great hardship on the respondents.

As this Court recognized in *Anderson* the factual context in which the immunity defense arises has a bearing on the availability of the defense. *Id.* at 3040-41. *See also, Rakovich v. Wade, supra,* at 1208. The district court must assess the availability of the defense in light of the pleadings and disclosed facts. Judge Holderman properly assessed Rice's new defense based on affirmative action as an effort to assert not only a new defense just prior to trial but also to raise a defense which Rice could not support by testimony having previously denied race was a factor in the respondents' demotions (App. A, 1a).

Rice responded "certainly not" when asked if he took any personnel action against any person in his 32-year career because

of that person's race (R122, Ex. C7). He explained: "If I bring any other factors besides efficiency and effectiveness into that top command structure of the Chicago Police Department, I would be doomed to failure as a superintendent" (*id.*) He denies that the personnel decisions at issue here were motivated by plaintiff's race (R122 at 12).

The district court had further good reasons in the factual context to deny Rice's immunity motions. By stipulation and agreement Rice bound himself not to file any further summary judgment motions after August of 1987 (R88). He broke this court order as memorialized in the court's final pretrial order (R88, 89).

Also, the district court committed four weeks' trial time to this case. The judge specifically selected the date of March 6, 1989 so that a jury could be picked from a new pool of prospective jurors instead of from holdovers. All other civil cases on his docket were denied the right to trial during these four weeks. Moreover, three plaintiffs traveled from out-of-state for the trial and all seventeen were present in court, prepared for trial. Further, plaintiffs' counsel set aside four weeks in their schedules to try the case and had been preparing the clients and witnesses since at least the first of the year. This Court, other district court judges and clients of plaintiffs' counsel made concessions to accommodate the upcoming trial.

II.

THE SEVENTH CIRCUIT CORRECTLY RELIED ON DICTUM WHERE IT CONFIRMED PRIOR CONSISTENT CASE AUTHORITIES THEREBY ESTABLISHING CLEAR LAW FOR QUALIFIED IMMUNITY PURPOSES.

Respondent Rice argues that he should be entitled to qualified immunity on the retaliation claims because a reasonable official would not have known in 1983 that retaliating against a person for filing a federal lawsuit violated clearly established law.

The district court and the Seventh Circuit correctly recognized that *Altman v. Hurst,* 734 F.2d 1240 (7th Cir. 1984) established that the subject matter of a suit dictates the entitlement to First Amendment protection from retaliation. It is undisputed that on December 2, 1983, the demotions were covered on television and Superintendent Rice prepared a press release. Further, as Judge Holderman reasoned, an allegation that the Superintendent of Police used race as a criteria in making promotions and demotions in the upper ranks of the Police Department raises a matter of public concern (R53). For these reasons, the court found that Rice could reasonably have been expected to know that on June 11, 1984, that retaliation was unconstitutional.

There is, however, an even stronger reason for finding petitioner Rice's argument on this point frivolous. The case entitled, *Alliance to End Repression v. City of Chicago,* 561 F. Supp. 537, at 562-3 (N.D. Ill. 1982) "clearly and expressly" prohibits retaliation against persons for exercising their First Amendment rights. The City which is the subject of the decree concedes that the federal consent decree forbids disruption, interference or harassment of any person because of conduct protected by the First Amendment. In light of this consent decree, Rice's argument on the retaliation count is frivolous.

Finally a federal magistrate has already determined that Rice retaliated against Marshall Considine, former head of the Chicago Police Department's Crime Laboratory. Her recommendations made after an extensive hearing are appended. (App. C, 6a). In the course of making findings and conclusions, the magistrate clearly concluded that Rice's actions against Considine implicated First Amendment protections (App. C, 53a). Rice's attorney did not then raise a defense of official immunity. It was almost three years later before they raised the defense. The injunction proceeding initiated by Considine was later mooted by his retirement.

CONCLUSION

This Court should, for the foregoing reasons deny Rice's petition for certiorari and allow this case to proceed expeditiously to trial.

Respectfully submitted,

JOHN L. GUBBINS
Attorney for Respondents

APPENDIX A — TRIAL TRANSCRIPT, *MALONEY v. RICE*, NO. 85C 1905 (JULY 25, 1988-AUGUST 8, 1988)

[Commencing at p. 1249]

Q. Who was the Mayor who appointed you? A. Well, the prior Mayor was Jane Byrne.

Q. And that is the mayor who appointed the members who then nominated you? A. That's correct.

Q. All right. Superintendent, as I understand your testimony, you have been a lieutenant since 1968 and a member of the Chicago Police Department exempt ranks since 1970, is that correct? A. That's correct.

Q. Superintendent, in all that time, have you had occasion to make many, many personnel decisions? A. That's correct.

Q. Have you ever made any of those decisions with regard to anyone of your men based on their race or based on their politics? A. No.

Q. And let me ask you specifically, with regard to —

MR. THEOBALD: Judge, I just have a general objection to all this as beyond the scope.

If you want to do it now rather than later, that's okay. I don't know how far we are going.

Appendix A

THE COURT: I don't either, but those answers may stand.

MR. PIERS: Very well.

* * *

[Commencing at 1433]

He was one of my deputy chiefs in patrol, and I was favorably impressed with his dedication and loyalty to the Chicago Police Department in my working with him in prior capacities.

I've always been deeply impressed with his professionalism, his love for law enforcement, his zest for law enforcement, his ability to comminicate.

Q. Now, there has been some testimony in this case that — strike that, please.

Did politics play any role in your selection of Captain Jemillo for that job? A. Certainly not.

Q. Did politics play a role in the selection or retention of any of these persons? A. Certainly not.

Q. How about race, Superintendent. I've asked you to identify for the ladies and gentlemen the race or ethnic background of these persons.

Appendix A

Is that a factor that you considered at the time in making this reorganization? A. No, certainly not, because that exempt group will make or break a superintendent. And I have to choose people whom I feel will do the job and command those different units in a professional and responsible way.

If I bring any other factors besides efficiency and effectiveness in that top command stucture of the Chicago

* * *

APPENDIX B — JURY VERDICT OF AUGUST 8, 1988

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate: PLUNKETT

Case Number: 84C 689 / 85C 1905

Date: August 8, 1988

Case Title: MALONEY, *et al.* v. WASHINGTON, *et al.*

HAUGHEY, *et al.* v. WASHINGTON, *et al.*

ORDER

We, the jury, find for all the defendants and against the plaintiffs William Maloney and Joseph Haughey on both the racial and political discrimination claims. We, the jury find for the plaintiff Daniel O'Sullivan and against the defendants Fred Rice and Edwin Bishop on the racial discrimination claim and total actual damages in the amount of $30,000 is awarded to plaintiff O'Sullivan. We, the jury find for the defendants and against the plaintiff O'Sullivan on the political discrimination claims. We, the jury find for the plaintiff Russell Luchtenburg and against defendants Fred Rice and Edwin Bishop on the racial discrimination claim and total actual damages in the amount of $60,000 is awarded to plaintiff Luchtenberg. We, the jury find for all the defendants and against plaintiff Luchtenberg on the political discrimination claim. We, the jury find that punitive damages should be assessed against defendants Fred Rice and Edwin Bishop, and we award each of the plaintiffs Daniel O'Sullivan and Russell Luchtenberg sum of $1.00 from Fred Rice and $1.00 from Edwin Bishop.

Appendix B

Trial ends.

Plaintiffs oral motion to reinstate plaintiffs O'Sullivan and Luchtenberg as Chicago Police Officers, taken under advisement.

Status hearing set for August 11, 1988 at 10:15 a.m.

APPENDIX C — MAGISTRATE'S REPORT AND RECOMMENDATION OF SEPTEMBER 20, 1985

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DISTRICT

MARSHALL CONSIDINE,

Plaintiff,

v.

PAUL GALL and FRED RICE, individually and in their official capacity, CHICAGO POLICE DEPARTMENT, and CITY OF CHICAGO,

Defendants.

No. 84 C 10013

REPORT AND RECOMMENDATION

TO THE HONORABLE JAMES F. HOLDERMAN, one of the Judges of the United States District Court for the Northern District of Illinois.

This case came before the court on plaintiff's motion for a temporary restraining order to prohibit defendants from reassigning plaintiff from his headquarters position as Special Employment Sergeant in the Special Functions group of the Patrol Division to a Patrol Division field assignment in the 16th Police District. Plaintiff alleges that his reassignment to the field, as well as his earlier transfer from the Crime Laboratory to the Special Functions group in September 1984, was brought about in

retaliation for his participation as a plaintiff in other litigation pending in this district entitled *Auriemma, et al. v. City of Chicago, et al.*, No. 84 C 1224, a case challenging the demotion of plaintiff and other formerly high-ranking police officials as politically motivated (herinafter "Auriemma"). On May 22, after the commencement of the hearing on the motion for a temporary restraining order and on the parties' joint motion, the motion for a temporary restraining order was converted into a motion for a preliminary injunction.

Plaintiff's complaint alleges, in pertinent part, that on December 2, 1983, he was demoted from his position as Director of the Chicago Police Department Crime Laboratory, a position he had held for approximately six years, and was replaced by defendant Paul Gall. Plaintiff resumed his career rank of sergeant and remained assigned to the Crime Laboratory. Thereafter, on February 7, 1984, plaintiff, along with 17 other similarly demoted members of the Chicago Police Department, filed the *Auriemma* lawsuit against the City of Chicago, Mayor Harold Washington, the Chicago Police Department and Police Superintendent Fred Rice, alleging that their demotions violated their rights under the First and Fourteenth Amendments. Three days later, Director Gall unsuccessfully sought to have plaintiff transferred out of the Crime Laboratory, explicitly stating as a reason the fact that plaintiff had filed suit to take away his job. Plaintiff further alleges that on Sepember 4, 1984, a few weeks after plaintiff signed an affidavit for use in the *Auriemma* litigation naming Gall as a supporter of Mayor Washington who was promoted to replace plaintiff because of his political connections, Gall, "in response to this affidavit," again requested plaintiff's transfer. As a result, on September 13, 1984, plaintiff was transferred to the Patrol Division, "a position which involves considerably less responsibility, and which is outside the area of [plaintiff's] long

time specialization." Complaint ¶13. The complaint seeks a declaratory judgment that the conduct of the defendants constitutes retaliation for the exercise of plaintiff's constitutional rights, injunctive relief requiring that plaintiff be restored to a position in the Crime Laboratory, punitive damages in the amount of $50,000.00, compensatory damages, costs and attorneys' fees.

On May 7, 1985, plaintiff filed his motion for a temporary restraining order. In his motion, he alleged that in violation of the Police Department's own policies and rules, defendants had ordered him reassigned from the Personnel Department of the Patrol Division, where he had been assigned since his transfer from the Crime Laboratory, to the 16th Police District. His motion alleged that this reassignment was further retaliation for his involvement in *Auriemma* and constitutes "punitive and malicious harassment." Motion, ¶2. The motion seeks to restrain defendants from carrying out this reassignment.

FINDINGS OF FACT

1. Marshall Considine joined the Chicago Police Department in 1956 as a patrolman. He served as a foot patrolman in the Albany Park District until March 1957 when he volunteered for and was detailed into a unit known as the Task Force, a group of approximately 100 motorcycle police officers assigned to look for guns, narcotics and gambling paraphernalia in high crime areas in the city. After approximately 1 1/2 years in this assignment, Marshall Considine was assigned to a special detail of the Task Force which was concerned with vice. In 1961, Marshall Considine was assigned to the robbery detail at 11th and State, from which, after approximately one year of service, he applied for and was accepted into a Chicago Police Department training program for crime scene technicians. After completing the program, Marshall

Appendix C

Considine was assigned to the Mobile Unit of the Chicago Police Department Crime Laboratory. Shortly after his assignment to the Crime Laboratory, Marshall Considine was promoted to the position of Police Lab Tech I, a Crime Laboratory position which provided the equivalent of detective's pay. In this position, Marshall Considine's duties included investigating major crime scenes; photographing, diagramming and searching crime scenes; removing physical evidence and fingerprinting. Approximately one year after his promotion to Lab Tech I, Marshall Considine was promoted to Lab Tech II, providing him with the equivalent of sergeant's pay. In 1966, after a competitive examination, Marshall Considine was promoted to sergeant. Pursuant to the request of the then Director of the Crime Laboratory, he was retained in the Crime Laboratory as a watch commander for approximately 90 days, whereupon he was promoted to Police Lab Tech III, a supervisory position providing the equivalent of lieutenant's pay. At some time thereafter, Sergeant Considine was made Commanding Officer of the Mobile Unit section, a position he held until 1972. In 1973, Sergeant Considine became Administrative Assistant to the Director of the Crime Laboratory. In 1974, Sergeant Considine became Commanding Officer of the Crime Scene Processing unit. This unit encompassed the Mobile Unit and the evidence technicians section and was responsible for the investigation of all major crime scenes within the city; it also provided assistance to suburban police departments. In this position, Sergeant Considine supervised approximately 90 people. In 1977, the Director of the Crime Laboratory, Captain Frances Flanagan, retired. Sergeant Considine was appointed Acting Director of the Crime Laboratory. Subsequently, Sergeant Considine was promoted to the position of Director of the Chicago Police Department Crime Laboratory. This promotion followed a competitive selection process. Public notice was given of a vacancy in the position. Sergeant Considine applied, and, after

being interviewed by a selection committee, was appointed by Superintendent James O'Grady. The Director of the Chicago Police Department Crime Laboratory is a member of the Chicago Police Department's exempt ranks. The exempt ranks include approximately 100 upper level executive police positions. (Considine, May 21, 57-66; Nowicki, May 8, 95.)[1]

2. Sergeant Considine graduated from a two-year program at Wright Junior College and subsequently accumulated approximately one year's worth of additional college credit. He graduated from a six-week police management course at Northwestern University and a three-month course given by the F.B.I. National Academy. He has taken several specialized courses relating to the work of the Crime Laboratory given by or through the Chicago Police Department. (Considine, May 21, 68-69.)

3. Sergeant Considine is past president of the F.B.I. National Academy Associates of Northern Illinois and vice-president of the F.B.I. Academy Associates of Illinois. He has lectured on crime laboratory procedures and case investigation for, among others, the Illinois Department of Law Enforcement, the University of Louisville, Northwestern University, John Marshall Law School, the University of Georgia and Florida Institute of Law Enforcement. (Considine, May 21, 70.)

4. On December 2, 1983, Sergeant Considine was called into the office of Police Superintendent Fred Rice and told that he was being demoted from the exempt rank of Director of the Crime Laboratory to his career service rank of sergeant. He was told

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1. References are to the transcript of the hearing on plaintiff's motion for a preliminary injunction and include the name of the witness, the date of the testimony and the page of the transcript for that date.

that he had done a commendable job, but was being replaced by someone whose management style was more compatible with the Superintendent's. The Superintendent told Considine that he was going to be retained in the Crime Laboratory. (Considine, May 21, 72-73; Rice, May 17, 68.)

5. Paul Gall, Sergeant Considine's replacement as Director of the Chicago Police Department Crime Laboratory, joined the Chicago Police Department as a patrolman in the Albany Park District in 1957. In 1958, he was assigned as a youth officer, a position in which he served until January 1, 1961, when he was promoted to sergeant. He served as a patrol sergeant in the Town Hall district until, following a competitive examination, he was promoted to lieutenant on October 1, 1961. He was then assigned to the Shakespeare district where he served for approximately one year. He was then selected to attend Northwestern Traffic Institute where he completed the nine-month course. Upon his return to the Chicago Police Department, he was assigned to spend six months in the Research and Development Division working on the generation of innovative ideas for then Superintendent O.W. Wilson. Thereafter, Lieutenant Gall served in the Humboldt Park and Wood Street districts. On March 23, 1965, pursuant to a competitive examination, Lieutenant Gall was promoted to Captain of Police. As a captain, Gall served in the Patrol Division in the Englewood, Wood Street and Fillmore districts and as a relief captain providing vacation relief for a number of different districts. (Gall, May 22, 55-62.)

6. Captain Gall holds a two-year degree from Wright Junior College and a Master of Public Administration degree from the Illinois Institute of Technology, which he attended while a member of the Chicago Police Department during the 1960's. In December of 1983, shortly after being appointed Director of the Chicago

Appendix C

Police Department Crime Laboratory, Captain Gall received a Doctor of Public Administration degree from Nova University in Florida. (Gall, May 22, 62-64.)

7. On December 2, 1983, Captain Gall was called into the ofice of Superintendent Fred Rice. He was told that Superintendent Rice knew of his "educational and managerial talents" and wanted him to be the Director of the Crime Laboratory. (Gall, May 22, 65.)

8. Prior to his appointment as Director of the Crime Laboratory, Captain Gall had had no prior direct contact with Superintendent Fred Rice or with Sergeant Considine. He learned from Superintendent Rice that his predecessor was Sergeant Considine. Captain Gall never applied for the position of Crime Laboratory Director and had no notice, prior to December 2, 1983, that he was being considered for the position. (Gall, May 22, 67, 162-164.)

9. Mayor Harold Washington appointed defendant Fred Rice to Superintendent of the Chicago Police Department on August 23, 1983. Defendant Rice has served continuously in that position to the present time. As Superintendent, Rice is the chief executive officer of the Chicago Police Department and is the official responsible under Illinois law for its operations and actvities. (Rice, May 17, 54, 75-76.)

10. Defendant City of Chicago is a municipal corporation organized under and subject to the laws of the State of Illinois. The Chicago Police Department is an agency of defendant City of Chicago.

11. Shortly after his appointment as Director of the Crime

Laboratory, Captain Gall had to travel to Fort Lauderdale, Florida, to defend his doctural dissertation. He was away from the Crime Laboratory for approximately four to six days. (Gall, May 22, 66.)

12. Following his demotion, Marshall Considine remained at work in the Crime Laboratory for a period of approximately ten days to two weeks. He then took a furlough and was away from the Crime Laboratory for two to three weeks over the Christmas holidays. (Considine, May 21, 74.)

13. At some time after his appointment as Director of the Crime Laboratory, either in mid-December before Sergeant Considine's furlough (Gall, May 22, 67-68) or in January 1985, soon after Sergeant Considine returned from his furlough (Considine, May 22, 181), Director Gall took Sergeant Considine to lunch at a Greek restaurant on Halsted Street. According to Director Gall, "the sole purpose of that meeting was to solicit Sergeant Considine's cooperation and his input as a person who had been Director of the Crime Laboratory now for six or eight years." (Gall, May 22, 68.) The luncheon was cordial. (Gall, May 22, 68-69.)

14. On December 19, 1983, Director Gall requested the promotion of Sergeant Considine to the position of Lab Tech III, the position Considine had held before becoming Director of the Crime Laboratory. The salary of a Lab Tech III is higher than that of a police sergeant and roughly the equivalent of the salary of a police lieutenant. (Gall, May 22, 69; Considine, May 21, 74-75, 61-62; Pl. Ex. 11 A and B.) This promotion request was approved shortly thereafter by Deputy Superintendent Rodriguez who sent it on through ordinary channels for the additional approvals required. (Rodriguez, May 10, 60.)

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15. During the period from December 2, 1983, through February 7, 1984, Sergeant Considine assisted Director Gall in formalizing Director Gall's membership in the American Society of Crime Laboratory Directors. (Considine, May 22, 174-175.)

16. During the period from December 2, 1983, through February 7, 1984, Director Gall and Sergeant Considine were present together in the Crime Laboratory for a maximum of five weeks. During this period, Director Gall never counselled Marshall Considine or advised him that his performance was unsatisfactory. During this period of time, Director Gall's request for a promotion for Marshall Considine was pending. (See 14 above; Gall, May 22, 154-155; Considine, May 21, 79-80; Rodriguez, May 10, 61.)

17. On February 7, 1984, Sergeant Considine and seventeen other formerly exempt rank police officers who had been demoted by Superintendent Rice on December 2, 1983, filed suit challenging their demotions on due process and First Amendment grounds. *Auriemma, et al. v. City of Chicago, et al.*, No. 84 C 1224.

18. On or about February 8, 1984, Director Gall learned about the *Auriemma* suit from a newspaper article. From this article, Director Gall understood the suit to charge "that all of us that were appointed by Superintendent Rice were more or less a bunch of political appointees and that was our sole qualification for our appointment and that the plaintiffs in the case were . . . attempting to get their jobs back . . . . " Director Gall took the news of this lawsuit in a personal manner. He testified that his "feelings were hurt" and he was angry with himself for having kept Marshall Considine in the Crime Laboratory after he was demoted. (Gall, May 22, 75-76.)

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19. On February 10, 1984, Director Gall wrote a memo to his supervisor, Deputy Superintendent Matt Rodriguez, informing Rodriguez that "my predecessor has filed suit asking my removal as unqualified, stating my appointment as Director of the Crime Laboratory was political." Gall's memo stated that the suit placed him "in the untenable position of having a subordinate sharing my office who has publicly stated that I am unqualified for the job of Director of the Crime Laboratory. He has filed suit to take away my job." Director Gall requested that a conference be set up with the Corporation Counsel "to ascertain what action can be taken to remove Marshall Considine form his position in the Crime Laboratory." (Exhibit C to plaintiff's Complaint; Gall, May 22, 76-77.) Director Gall hand-carried his memorandum to the office of Deputy Superintendent Rodriguez. (Gall, May 22, 77.)[2]

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2. The Gall memorandum, in its entirety, reads as folows:

> It has been brought to my attention that my predessor [sic] has filed suit asking my removal as unqualified, stating by appointment as Director of the Crime Laboratory was political.
>
> The former Director has been treated with a charity well beyond basic requirements [sic]. He has been retained in a supervisory position within the Crime Laboratory in spite of a lack of personal enthusiasm. I feel that he has been afforded every opportunity to demonstrate whatever latent managerial talent that he may possess.
>
> Marshall Considine has not demonstrated that he has either the ability or the personal desire to cooperate with the current management of the Crime Laboratory. He has placed me in the untenable position of having a subordinate sharing my office who has publicly stated that I am unqualified for

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20. Deputy Superintendent Rodriguez refused to act on Director Gall's memo, stating that, to the extent Director Gall's reasons for seeking Sergeant Considine's removal from the Crime Laboratory were related to the lawsuit, "that was personal and . . . in no way would I accept this report or approve it." Rodriguez also concluded that Director Gall was angry and that the memorandum contained inappropriate "personal digs" such as its sarcastic reference to Sergeant Considine's "latent managerial talent." Rodriguez told Gall "that as a manager he has got to go back and reflect on things not out of anger but as a manager"; and he "told him also in no uncertain terms that I did not appreciate the personal digs. . . ." (Rodriguez, May 10, 71, 122-123, 133.)

21. There is a difference in personality and working style between Paul Gall and Marshall Considine. With respect to personality, Sergeant Considine, who in comparison to Director Gall has a serious and somewhat introverted manner, appeared to Director Gall to be "petulant." (Gall, May 22, 74, 155.) With respect to working style, there appears to have been a serious lack of communication between the two men. While Sergeant Considine looked to Director Gall to delegate certain specific

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> the job of Director of the Crime Laboratory. He has filed suit to take away my job.
>
> This creates an impossible situation. Personal loyalties within the laboratory will be strained, and effective management difficult. I respectfully request a conference with the Corperation [sic] Counsel to ascertain what action can be taken to remove Marshall Considine from his position in the Crime Laboratory.

Exhibit C to the Complaint.

responsibilities to him, Director Gall appears to have viewed his role as a manager as less directive, and he failed to make clear to Sergeant Considine what he expected Sergeant Considine to do. Before leaving for his furlough in December 1983, Sergeant Considine asked Director Gall to clarify his duties. Director Gall did not do so, but told Sergeant Considine that he would do so at a later time. When Sergeant Considine returned from his furlough in January, he again spoke to Director Gall about clarifying his duties, and again Director Gall responded that they would discuss it later. This kind of interchange took place on more than one occasion. (Considine, May 21, 74-76; Considine, May 22, 180-181; Gall, May 22, 129, 154-155.) Director Gall said that he responded on one occasion to a request from Sergeant Considine regarding clarification of his duties by telling him "I wanted his input on mostly everything." (Gall, May 22, 123, 140.) Gall also said that he expected Considine "to act as more or less my aide" and saw his (Considine's) role as providing "general assistance to the Director." (Gall, May 22, 129, 140.) While Director Gall testified that he gave Sergeant Considine "a number of things" to do, the only assignment Director Gall could specifically recall was itself rather indefinite and open-ended, being a "report on how the Lab ran." (Gall, May 22, 79, 122.)[3]

22. The court finds that Sergeant Considine's failure to satisfy Director Gall's expectations stemmed primarily from Director Gall's inability to make his expectations clear, due in large part to Director Gall's failure, because of other demands of his new

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3. Director Gall testified that he never received this assigned work back. Since, however, there was no testimony as to when the assignment was given or when Director Gall expected to receive it back, the incident cannot be placed chronologically and thus is of no assistance in evaluating Director Gall's motivation in writing the February 10 memo.

position to pay adequate attention to the issue of the effective utilization of Sergeant Considine. Director Gall's testimony made clear that at the outset, he had no definite idea of what Crime Laboratory personnel were doing or should be doing; he stated, "I was trying to get a handle on everything that was going on around me and there were so darn many problems and so many things to do, too many balls in the air at the same time." While Director Gall's distractions may not have significantly interfered with the performance of other Crime Lab employees, the problem of how to utilize the former Director was a difficult issue which Director Gall failed meaningfully to address. (Gall, May 22, 156-57, 160-61.) In any event, Director Gall never clarified Sergeant Considine's duties and never delegated any ongoing responsibilities to him. (Gall, May 22, 122, 129; Considine, May 22, 181.) As a result, Sergeant Considine occupied himself in early 1984 largely with activities he took on himself such as manning the Mobile Unit desk. In addition, he performed certain specific tasks which had been assigned him by Director Gall; for instance, Considine was asked to work on requisitions and he did so. (Considine, May 21, 76; Gall, May 22, 123-124.)

23. Director Gall's initially vague and expansive view of the functions Marshall Considine could serve in the Crime Laboratory ("I wanted his input on mostly everything") did not amount to the kind of clarification Sergeant Considine needed and repeatedly requested. Moreover, Director Gall's ideas for utilizing Sergeant Considine in early 1984 were largely inchoate and disorganized. Moreover, Director Gall failed to delegate any meaningful authority to Sergeant Considine. Thus, while stating that he wanted Sergeant Considine to work on the budget, Director Gall requested that another individual, James Hickey, be detailed into the Crime Laboratory to work on the budget. With respect to involving Sergeant Considine in the budgeting process, he and Hickey merely

asked Considine questions on the budget "a couple of times." (Gall, May 22, 74.)

24. The filing of the *Auriemma* litigation triggered Director Gall's decision to seek the removal of Sergeant Considine from the Crime Laboratory on February 10, 1984. Director Gall and Sergeant Considine had been in the Crime Laboratory together for only five weeks. Director Gall himself testifited that the lawsuit "was a contributory factor" and that it "was a contributing factor to write the memo at that particular time. . . ." (Gall, May 22, 152.) The filing of the *Auriemma* litigation "precipitated" Director Gall's decision to give up on and get rid of Sergeant Considine after the brief period of time that had passed since Director Gall's assumption of the Crime Laboratory directorship.

25. After the filing of the *Auriemma* litigation, the relationship between Director Gall and Sergeant Considine deteriorated, despite the fact that Sergeant Considine's behavior was essentially unchanged. (Rodriguez, May 10, 72; Gall, May 22, 79; Considine, May 21, 80; May 22, 171-172.) Director Gall's response to the *Auriemma* lawsuit was a factor which contributed to this deterioration.

26. Following the filing of the *Auriemma* litigation, Director Gall gave Sergeant Considine few assignments, perceiving it as a "lost cause" to ask Sergeant Considine questions or give him assignments. (Gall, May 22, 79.) Sergeant Considine testified that he felt that he had been "designated as a nonperson out of George Orwell's 1984." (Considine, May 21, 80.)

27. Prior to the filing of the *Auriemma* litigation, Director Gall had never complained to his supervisor about Sergeant Considine. After Director Gall's February 10 memorandum,

Director Gall began criticizing Sergeant Considine to Deputy Superintendent Rodriguez. (Rodriguez, May 10, 106, 113.)

28. In April 1984, Director Gall withdrew his request for a promotion for Sergeant Considine. (Rodriguez, May 10, 61.)

29. Beginning in approximately May or June 1984, Director Gall began excluding Sergeant Considine from supervisory meetings in the Crime Laboratory. (Gall, May 22, 105; Considine, May 21, 88.)

30. There was no evidence that Sergeant Considine was ever insubordinate or ever made derogatory statements, in public or in private, concerning Director Gall's abilities or policies.

31. It is a matter of both policy and practice within the Chicago Police Department for individuals to be talked to and counselled in cases of unsatisfactory performance and particularly in cases of deteriorating performance. (Townsend, May 8, 54-55; Nowicki, May 8, 78-81, 85-87; Rodriguez, May 10, 90-99; Pl. Exs. 6, 7, 8, 21 at p.11.)

32. At no time before or after the filing of the *Auriemma* litigation did Director Gall counsel Marshall Considine or otherwise speak to him regarding any perceived deficiencies in his performance. (Gall, May 22, 153; Considine, May 21, 86.) Indeed, at no time did Director Gall and Sergeant Considine engage in any extended conversation. (Considine, May 21, 86.)

33. The court finds that prior to the filing of the *Auriemma* lawsuit, Director Gall was frustrated by Sergeant Considine's failure to satisfy his expectations, that that failure was not Sergeant Considine's fault but stemmed from Director Gall's failure to

make his expectations clear, and that the filing of the lawsuit substantially increased Director Gall's frustration with Sergeant Considine.

34. On September 4, 1984, Director Gall again requested the reassignment of Sergeant Considine. In his memorandum requesting the transfer, he also requested that Sergeant Francis Kehoe be transferred into the Crime Laboratory. (Pl. Ex. 14B.) This time, Deputy Superintendent Rodriguez approved the request. (Gall, May 22, 80; Pl Ex. 14A.) He did not question Director Gall concerning his reasons for wanting to transfer Sergeant Considine out of the Crime Laboratory. (Rodriguez, May 10, 81.) Sergeant Considine's transfer was effective on or about September 13, 1984. (Pl. Ex. 4.)

35. Director Gall never, after February 10, 1984, viewed Sergeant Considine as a viable member of the Crime Laboratory staff.

36. Prior to the publication of the actual transfer order, but after Marshall Considine's transfer had been approved, Sergeant Considine had a conversation with Chief of the Patrol Division William Keating. Chief Keating asked Sergeant Considine if he would be willing to work in Patrol Division Headquarters in the position left open by Sergeant Kehoe's transfer into the Crime Laboratory. Sergeant Considine told Chief Keating that he would be happy to take on that position. (Considine, May 21, 89-90.)

37. All transfer requests must be approved by First Deputy John Jemilo and then approved by Superintendent Fred Rice. (Nowicki, May 8, 68, 88.) The Considine-Kehoe swap was discussed with Superintendent Fred Rice by Deputy Superintendent Rodriguez and approved by Superintendent Rice. (Rice, May 17,

102-104.) It may have been discussed by Chief Keating with First Deputy Jemilo. (Jemilo, May 15, 149.)

38. The duties required of most Crime Laboratory personnel involve specialized technical skills. (Rodriguez, May 10, 131.) It is highly unusual to involuntarily reassign experienced personnel out of the Crime Laboratory. No one was transferred or detailed involuntarily out of the Crime Laboratory during Marshall Considine's 23 years there. (Considine, May 21, 70-71.)

39. The reassignment of supervisory personnel,[4] when not initiated by the member himself, does not normally take place in the Chicago Police Department without some effort to consult with the member and apprise him of what is happening and why. Such counselling is a matter of Chicago Police Department policy and practice, as well as of good police management. (Townsend, May 8, 54-55; Nowicki, May 8, 78, 80-81, 85-87; Rodriguez, May 10, 90-99; Pl. Exs. 6, 7, 8, 21 at p. 11; Considine, May 21, 71.) Director Gall did not engage in any such counselling or consultation with Sergeant Considine. (Gall, May 22, 154-155.)

40. Upon his transfer, Sergeant Considine was assigned to work as the Special Employment sergeant in the Special Functions group of the Patrol Division under Lieutenant Ronald C. Garcia. (Garcia, May 10, 6-8.) This was the position which had been held by Sergeant Kehoe for the preceding 2-1/2 years. (Garcia, May 10, 4.) In this position, Sergeant Considine was responsible for supervising the police officers who schedule officers for the Special Employment Program, for scheduling a segment of police officers himself and for supervising all supervisors assigned to Special

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4. The supervisory ranks are the ranks of sergeant and above. (Brzeczek, May 21, 8.)

Employment. (Garcia, May 10, 8.) The job involved dealing with the "considerable pressure" that may be applied to induce the Special Employment sergeant to favor specific individuals. (Considine, May 21, 100.) Prior to taking on the assignment, Sergeant Considine had been advised by Sergeant Kehoe that the job was a "pressure job." (Considine, May 21, 89.)

41. On November 21, 1984 approximately two months after his transfer, Sergeant Considine filed the instant suit, complaining that his transfer out of the Crime Laboratory constituted retaliation for the exercise of his First Amendment rights in filing suit in *Auriemma, supra.*

42. Chicago Police Department personnel receive efficiency ratings twice a year. They are rated on a scale of 0-100 on quality of work, quantity of work, dependability, personal relationships and attendence/promptness. During the period he was Director of the Crime Laboratory, Marshall Considine was not rated, but prior to becoming Director, his usual marks were in the mid or high 90's range. His last mark prior to becoming Director was 99. (Dep. Notice 84-73; Considine, May 21, 64.)

43. On November 29, 1984, approximately one week after the filing of the instant lawsuit, Director Gall prepared an evaluation of Sergeant Considine. In this evaluation, Director Gall stated that Sergeant Considine had "refused to voluntarily provide any work" and "had to be *specifically* instructed to produce anything" and that Sergeant Considine was "petulant, pouted, uncommunicative — uncooperative with peers and superiors." Director Gall gave Sergeant Considine an overall performance rating of 75, indicating "minimally acceptable performance." (Pl. Ex. 16; Dept. Notice 84-73.)

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44. Director Gall testified that he could not recall whether he was aware of the suit filed against him on November 21 when he prepared his performance rating of Sergeant Considine on November 29. (Gall, May 22, 106-107.) There was no evidence that the suit had been brought to Director Gall's attention prior to the preparation of the evaluation, and the court makes no finding in this regard.

45. While the Department Notice governing performance ratings in effect at the time Director Gall evaluated Sergeant Considine (#84-73) states that "[a] member's grade should not fluctuate greatly from period to period without sufficient cause" and counsels that ratings should not unfairly reject biases of individual supervisors, the rating given to Sergeant Considine by Director Gall was dramatically inconsistent — by 20 points — with any rating ever given to Sergeant Considine before or since. Nevertheless, Director Gall made no effort to counsel Sergeant Considine, to check with other supervisory personnel about Sergeant Considine's performance or in any way to determine the reason for the precipitous decline in Sergeant Considine's performance represented by Director Gall's rating.

46. William F. Keating is Chief of the Patrol Division of the Chicago Police Department and a member of the exempt ranks. He reports directly to First Deputy Superintendent John Jemilo and supervises, among other persons, John J. Townsend, the Deputy Chief of the Patrol Division Special Functions group. Deputy Chief Townsend is the supervisor of Lieutenant Ronald Garcia who was Sergeant Considine's supervisor while Sergeant Considine served as Special Employment Sergeant. (Keating, May 15, 70-73.)

47. Within the Chicago Police Department, personnel are

assigned in one of two ways, by transfer and by detail. A transfer is regarded as a permanent move whereas a detail is considered temporary, although it may be used in some circumstances to reassign someone pending a formal transfer order or where, for various reasons (usually budgetary), a formal transfer is not possible. (Rodriguez, May 10, 141-143; Zaleski, May 8, 24; Nowicki, May 8, 91; Brzeczek, May 21, 10-11.)

48. The police-year is divided into thirteen 28-day police periods, and departmental operations, including transfers, normally occur at the change date between police periods. Thursdays is always the change date, and transfer orders are published on the preceding Monday evening or Tuesday morning. (Brzeczek, May 21, 6-7, 11.)

49. A detail is usually of a temporary nature and is of no specific time duration; when an officer is detailed, all his paperwork remains in the district from which he was detailed. While transfers take place at the police period change date and provide for prior notice to the member and to the personnel of the two assignments involved, details can take place at any time on a close to immediate basis. Among the usual reasons for details are to be able expeditiously to meet an immediate, identifiable need on the part of the Department; to fill the need of a unit that needs an individual but does not have a line item in its budget for such an individual; and to act quickly where necessary to meet the need of a member (such as where a member needs to be removed from a stressful assignment quickly). (Rodriguez, May 10, 141-143; Nowicki, May 8, 91; Brzeczek, May 21, 12.)

50. On the morning of April 29, 1985, approximately eight months after Sergeant Considine's transfer to the Special Functions Group, Chief Keating met with First Deputy Jemilo. At that

meeting, First Deputy Jemilo instructed Chief Keating to move Sergeant Considine into a field position in a district. First Deputy Jemilo led Chief Keating to believe that this directive came from Superintendent Rice. It was part of First Deputy Jemilo's instructions to Chief Keating that the movement of Sergeant Considine be accomplished as soon as possible, even though the Police Department was in the middle of a transfer period and the reassignment would have to be accomplished by detail rather than transfer. While he was ordered to move Sergeant Considine into the field, Chief Keating was left with complete discretion as to where in the field to place Sergeant Considine. (Keating, May 15, 78-85; Jemilo, May 15, 119-120, 126.)

51. Although Chief Keating asked First Deputy Jemilo why Sergeant Considine was to be reassigned, he was given no reason other than the indication that the directive had come from the Superintendent. (Keating, May 15, 79-80, 85.) First Deputy Jemilo told Chief Keating that the duties previously performed by Sergeant Considine were to be given to one of the other sergeants or shared by them. (Jemilo, May 15, 162.)

52. Later on in the morning of April 29, 1985, Chief Keating informed Sergeant Considine that, pursuant to instructions from the First Deputy Superintendent, he was to be "detailed" out of Patrol Division Headquarters and into a district in the field. Chief Keating told Sergeant Considine that First Deputy Jemilo had informed him that First Deputy Jemilo was acting pursuant to the direction of Superintendent Rice, as Jemilo had led Keating to believe. When Sergeant Considine asked where he was going, Chief Keating said, "I told him that I would keep him close to home, that I would consider where he lived and everything, and that I wasn't out to hurt him. . . ." (Keating, May 15, 78-82.)

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53. Neither Chief Keating nor anyone under his supervision had requested that Sergeant Considine be moved out of his position as Special Employment Sergeant. Chief Keating understood Sergeant Considine to be doing a good job. Lieutenant Garcia, Sergeant Considine's immediate superior, did not want him moved. (Keating, May 15, 76-78.)

54. The decision to instruct Chief Keating to move Sergeant Considine into the field was reached at a meeting between Superintendent Rice and First Deputy Jemilo early on the morning of April 29. Sergeant Considine was specifically discussed at this meeting by name. (Jemilo, May 15, 122-123; Rice, May 17, 56-57.) Both Superintendent Rice and First Deputy Jemilo were aware at the time that Sergeant Considine was a plaintiff in the *Auriemma* case. (Rice, May 17, 57; Jemilo, May 16, 95.) First Deputy Jemilo initially made the suggestion to move Sergeant Considine. (Jemilo, May 15, 123-124.)

55. It was First Deputy Jemilo's testimony that he decided that Sergeant Considine should be moved to a district because the position of Special Employment sergeant was a "make work" position that "did not need a full duty sergeant." (Jemilo, May 15, 142.)

56. While this court cannot independently determine from the evidence presented whether or not the duties carried out by Sergeant Considine in his position as Special Employment Sergeant actually justified the assignment of a full-duty sergeant, it finds the evidence concerning how and why First Deputy Jemilo reached the decision to move Sergeant Considine, and in particular the decision to move Sergeant Considine immediately, inadequate to support a finding of good faith, non-retaliatory basis for this employment action. Specifically:

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(1) First Deputy Jemilo testified that he became aware that the position held by Sergeant Considine from September 1984 to April 1985 was a make-work position prior to December 1983, when Jemilo had been Administrative Deputy Chief of Patrol. Nevertheless, he never sought to terminate the position while it was held by Sergeant Kehoe, and he had approved the transfer of Sergeant Considine into the position eight months earlier. (Jemilo, May 15, 144-146, 151, 154.)

(2) First Deputy Jemilo also testified, in testimony that appears inconsistent with that set forth above, that he did not know that the position was a make-work position until he looked into it shortly before he decided to seek Sergeant Considine's reassignment. (Jemilo, May 15, 144, 150, 152.)

(3) In deciding to move Sergeant Considine out of the Special Functions group, First Deputy Jemilo testified that he considered whether Sergeant Considine was needed given the presence of two other full duty sergeants and the specific jobs that the three sergeants did. In testifying at the hearing, which took place only a few weeks after April 29, First Deputy Jemilo described the three sergeants' duties from written job descriptions prepared by his subordinates *after* April 29 and in preparation for the litigation, in order to aid his testimony. (Jemilo, May 16, 79-87.) Moreover, First Deputy Jemilo testified, in a manner that appears at least facially inconsistent

with his testimony in (1) above, that prior to the week preceding April 29, he was only "generally familiar with the assignments, and the positions held, and the activities that were performed by the sergeants that were assigned to that unit." (Jemilo, May 16, 80.)

(4) Despite the fact that a sergeant had held the Special Employment position for more than three years, First Deputy Jemilo testified that he concluded that Sergeant Considine should be moved immediately rather than waiting the approximately two weeks until the end of a police period when a more orderly and ordinary transfer could take place. The explanation given for moving Sergeant Considine in the middle of a transfer period, that it would have been "wasteful" to keep him in the position for an additional two weeks, failed, in this court's view, to account for the precipitous manner in which Sergeant Considine's movement was effectuated and suggested that the needs, expectations and standing of the member were counted of no consequence in the decision, contrary to all testimony concerning Chicago Police Department management practices. (Jemilo, May 15, 144.)

(5) First Deputy Jemilo decided that Sergeant Considine should be moved immediately without identifying the district to which he should be sent. Thus First Deputy Jemilo was not acting in response to any specific emergency need of the sort that would normally justify a mid-transfer period

reassignment. While Sergeant Considine was ultimately sent to the 16th District, where there is a shortage of sergeants, that shortage is of a chronic rather than an emergency nature, and the Commander of that District, when he heard that Sergeant Considine was being detailed into the district, arranged to allow him to take some time off before reporting in person, thus demonstrating that his district's needs did not require emergency action. (Jemilo, May 15, 120, 136-137; Jankowski, May 10, 146-147.) At the time of the hearing in this matter, Sergeant Considine had not yet begun to work in the 16th District. (Jankowski, May 10, 147.)

(6) First Deputy Jemilo made the decision to move Sergeant Considine into a field position without knowledge of or inquiry into Sergeant Considine's background, training or experience. (Jemilo, May 16, 121.)[5] Moreover, he made the decision with no attempt to consult with Sergeant Considine, counsel him, or give him prior notice or explanation.

(7) First Deputy Jemilo knew that Sergeant Considine would in all likelihood view this reassignment as undesirable. One year earlier a sergeant similarly reassigned had resigned rather

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5. The court notes that the decision to move Sergeant Considine to a district was consistent with Superintendent Rice's general policy of seeking to strengthen the Patrol Division presence in the field. Since not every sergeant in the Chicago Police Department has been sent to the field, however, the fact that what was

done here is *consistent* with a general policy does not establish that the general policy *caused* Sergeant Considine's reassignment.

> than accept a reassignment to the field. (Jemilo, May 15, 140.)
>
> (8) In making his decision that Sergeant Considine was in a make-work position and should be moved out of it immediately, First Deputy Jemilo never consulted with anyone in the Patrol Division, neither with Sergeant Considine's supervisors in the Special Functions group nor with Chief Keating. (Jemilo, May 15, 155-156.) It appears from the evidence presented that a decision by the First Deputy to eliminate a supervisory position in the Patrol Division, without consultation with any of the administrators of the Patrol Division, is extraordinary and contrary to normal procedure. First Deputy Jemilo's failure to seek input from the Patrol Division suggests that the needs of the Patrol Division did not constitute the primary motivation for the decision.

57. The functions previously performed by Sergeant Considine as Special Employment sergeant have been divided among a number of individuals with a police officer doing the scheduling and the two other Special Functions Group sergeants splitting the supervision of the program. (Garcia, May 10, 8-9.)

58. Except where the union contract requires otherwise, the usual and ordinary practice of the Chicago Police Department is for requests for reassignment to come from supervisors in the sending or receiving unit or from the member being reassigned; this is the practice where the person being reassigned is in the

supervisory ranks, sergeant or above. In the Patrol Division, it is the usual and ordinary practice for Chief Keating to evaluate such requests and make a recommendation to First Deputy Jemilo who, if he agrees with Chief Keating's recommendation, obtains the approval of Superintendent Rice. (Nowicki, May 8, 80; Keating, May 15, 104; Jemilo, May 16, 120.) Insofar as can be determined from the evidence presented at this hearing, the procedure followed in Sergeant Considine's case, in which the First Deputy decided to move supervisory personnel within the Patrol Division without consulting with the Chief of the Patrol Division, is inconsistent with Chicago Police Department management practices.

59. There is a tradition in the Chicago Police Department, attributed by the present Superintendent exclusively to previous administrations, of using transfers and reassignments for punitive purposes. (Rice, May 17, 117-122.) There is a perception in the Chicago Police Department that transfers and reassignments may be utilized for punitive purposes.

60. The manner in which Sergeant Considine was treated following the filing of the *Auriemma* litigation was perceived by other department members as being punitive in appearance. *(See generally* Nowicki, May 8, 85; Keating, May 15, 99; Jankowski, May 10, 146-148.) Sergeant Considine testified that in informing him on April 29 that he was to be reassigned, Chief Keating said, "Jemilo is sending you to the district. What have you done lately to offend someone?" (Considine, May 21, 103.) Chief Keating, recalling the conversation in less explicit terms, nevertheless indicated his discomfort with the reassignment: "I believe I asked him words to the effect if he knew why-if he knew why this was happening" and testified that he could have asked Sergeant Considine whom he had upset lately. (Keating, May 15, 99.) the

same discomfort was evident in Commander Jankowksi's reaction to the reassignment. (*See* Jankowski, May 10, 145-147.)

61. On April 29, 1985, the day Chief Keating and Sergeant Considine were informed that Sergeant Considine was to be detailed to a district, Lieutenant Garcia evaluated Sergeant Considine, giving him an overall efficiency rating of 95, consistent with all of Sergeant Considine's prior evaluations except that given him by Director Gall. Lieutenant Garcia's evaluative comments included the statements that "work is always complete and acceptable... motivates subordinates to excellence . . . does more than his position requires" and "has maintained good relationships with supervisors-peers-subordinates." (Pl. Ex. 9A,B.) A 95 rating is considered excellent. (Garcia, May 10, 5.)

62. Details such as occurred in Sergeant Considine's case are not the routine way in which personnel are moved in the Chicago Police Deparment absent identifiable emergency needs or budget considerations as outlined above, nor are mid-period changes routine. Permanent non-voluntary reassignments of persons in the supervisory ranks are uncommon. Detail or transfer orders not preceded by any consultation with the member, particularly when the member is in the supervisory ranks, diverge significantly from routine or ordinary practice. (Nowicki, May 8, 84-87, 91; Pl. Exs. 6,,7,8.)

63. At the time of his detail to the 16th District, Marshall Considine had not held a field position for approximately 23 years.

64. There is currently a shortage of supervisory personnel in the Crime Laboratory. (Rodriguez, May 10, 108-111; Gall, May 22, 141.)

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65. The position held by Marshall Considine in the Special Functions group in the Patrol Division headquarters remains open and unfilled. (Keating, May 15, 82.)

CONCLUSIONS OF LAW

The standards for determining a motion for a preliminary injunction are well-established in this circuit. In order to be entitled to a preliminary injunction, plaintiff must demonstrate that:

> 1. He has a reasonable liklihood of success on the merits; and
>
> 2. He has no adequate remedy at law or will be irreparably harmed if the injunction does not issue; and
>
> 3. The threatened injury to plaintiff if the injunction is not granted outweighs any harm that may accrue to the defendants from the requested injunction; and
>
> 4. The granting of the preliminary injunction will not disserve the public interest.

Roland v. Air Line Employees Association, International, 753 F.2d 1385, 1392 (7th Cir. 1985). These factors will be examined in light of the evidence presented at the preliminary injunction hearing held before this court.

I. *Likelihood of Success on the Merits*

To prove that his transfer from the Crime Laboratory and

his detail from the Special Function group to the 16th Police District were acts of retaliation for the excercise of his First Amendment rights, plaintiff will be required to demonstrate at trial, by a preponderance of the evidence, that he engaged in constitutionally-protected activity and that that activity was a substantial or motivating factor in the reassignments of which he complains. *Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 416 (1979); *Mount Healthy City School District Board of Education V. Doyle,* 429 U.S. 274, 284-85 (1977).

To carry his initial burden, plaintiff need show only that his protected conduct was a substantial factor in the employment actions he challenges. He is not required to show that protected conduct was the exclusive basis for the employment actions. *McClure v. Cywinski,* 686 F.2d 541, 545 (7th Cir. 1982).[6] Once the plaintiff has shown that constitutionally protected conduct was a substantial factor in the employment decisions he challenges, the defendants are entitled to show by a preponderance of the evidence that they would have reached the same employment decision in the absence of the protected conduct. *Givhan, supra* at 416. Plaintiff is then entitled to rebut defendants' evidence by showing that the rationale they presented for the challenged employment action is merely pretextual. *Morris v. Washington Metropolitan Area Transit Authority,* 702 F.2d 1037, 1045 (D.C. Cir. 1983).

It must be kept in mind that at this stage in the litigation,

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6. It is well-established in this circuit that retaliation can take the form of a retaliatory transfer as well as a retaliatory discharge. "The test is whether the adverse action taken by the defendants is likely to chill the exercise of constitutionally protected speech. This chilling effect can be accomplished through an unwanted transfer as well as through outright discharge." *McGill v. Board of Education,* 602 F.2d 774, 780 (7th Cir. 1979) (citation omitted).

a hearing on plaintiff's motion for a preliminary injunction, the court can do no more than decide where, from the evidence presented at the preliminary injunction hearing, the likelihood of success on the merits appears to lie.

It is clear at the outset that Sergeant Considine's participation as a plaintiff in the *Auriemma* litigation is conduct protected by the First and Fourteenth Amendments. The right to petition the courts is protected by the Bill of Rights. *California Motor Transport Company v. Trucking Unlimited,* 404 U.S. 508, 510 (1972). Accordingly, litigating a claim is a protected activity. *See Bowen v. Watkins,* 669, F.2d 979, 982 n. 2 (5th Cir. 1982). Moreover, the *Auriemma* litigation deals with alleged patronage demotions, a subject of manifest public concern and hence, of particular First Amendment importance. *See Connick v. Myers,* 461 U.S. 136, 149 (1983). Nor is there anything in this record to suggest that the interests of the Police Department, as employer, require restricting the scope of plaintiff's speech rights. There is nothing in the record to suggest that Sergeant Considine's participation in the *Auriemma* litigation interfered with his efficiency as a police officer, compromised his ability to perform his duties or disrupted the offices in which he worked. *See generally Connick, supra* at 150-52; *Wilson v. Taylor,* 658 F.2d 1021, 1027 (5th Cir. 1981). [7]

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7. In seeking to have Sergeant Considine transferred from the Crime Laboratory when he learned of the *Auriemma* litigation, Director Gall told Deputy Superintendent Rodriguez that because of the litigation, "Personal loyalties within the laboratory will be strained and effective management difficult". (Complaint, Ex. C.) While the court believes that Director Gall was legitimately and sincerely concerned about the tension the pendency of the litigation might create, it does not find this fear sufficient to remove the litigation from the protection of the First Amendment. There was no showing of actual

(Cont'd)

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A. *September 1984 Transfer from the Crime Laboratory to the Special Functions Group*

On December 2, 1983, plaintiff Considine was demoted from the position of Director of the Crime Laboratory, a position he had held for six years. Captain Paul Gall, an experienced police officer without Crime Laboratory experience or technical training, whose wife had been an active supporter of Mayor Washington in the mayoral election, was promoted to replace him. At the time of his demotion, Sergeant Considine was informed that he would remain assigned to the Crime Laboratory, as Director Gall's subordinate, and he resumed his career rank of sergeant. Shortly after his promotion, Director Gall spent four to six days away from the Crime Laboratory, and shortly thereafter, Sergeant Considine took a furlough, returning to work after the Christmas holidays in early 1984. On February 7, 1984, plaintiff filed suit in *Auriemma*. On February 10, 1984, within a day or two of learning of the lawsuit, Director Gall prepared a memorandum to his superior, Deputy Superintendent Rodriguez, complaining, *inter alia*, that Sergeant Considine "has filed suit to take away my job" and requesting "a conference with the Corperation [sic] Counsel to ascertain what action can be taken to remove Marshall

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(Cont'd)
disruption caused by the litigation and no showing that management was in fact made difficult because of it. Since employment litigation always generates some tension, it is this court's view that, in the absence of a showing of such a close working relationship between plaintiff and defendants that one can reasonably presume that personal loyalty and confidence are essential to proper functioning, some actual disruptive impact must be shown. *See McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1983). It should be noted in this regard that defendants did not contend that the impact of the litigation on Crime Laboratory management justified the transfer of Sergeant Considine; they contended instead that the lawsuit was not a motivating factor in Director Gall's decision to seek Sergeant Considine's removal.

Considine from his position in the Crime Laboratory." Deputy Superintendent Rodriguez refused to accede to Director Gall's request, based on the unacceptable reasons for the request as set forth in the memorandum. However, on September 1, 1984, pursuant to another request from Director Gall, Sergeant Considine was transferred out of the Crime Laboratory. This transfer is challenged as retaliatory.

Weighing heavily in plaintiff's favor is the fact that as of February 10, given their respective absences during December, Direcor Gall and Sergeant Considine had been together in the Crime Laboratory for at most five weeks. During the December 2 to February 10 period, Director Gall had requested a promotion for Sergeant Considine, and Sergeant Considine had assisted Director Gall in formalizing his membership in the American Society of Crime Laboratory Directors, both indicia of reasonably cordial relations. The two had had little or no extended conversation, but they had had a cordial lunch together at Director Gall's invitation at a local restaurant. During this time period, there is no indication that Director Gall ever suggested to Sergeant Considine or to anyone else that Sergeant considine's performance was less than satisfactory, and during the entire period of time, Director Gall's request for a promotion for Sergeant Considine was pending.

On February 8, Director Gall learned of the *Auriemma* suit from a newspaper article. The evidence is clear that he reacted to the suit by becoming extremely angry, viewing its allegations, as he understood them, as insubordination, a personal attack on his competence, a charge against him of being a patronage employee and a threat to his job. Emotionally charged, he wrote his memorandum to Deputy Superintendent Rodriguez, seeking plaintiff's transfer. Despite defendants' efforts to prove the

contrary, the court finds this memorandum unambiguous: Considine had to be removed because he had challenged the legitimacy of Gall's authority. This memorandum was replete with derogatory, sarcastic attacks on plaintiff. Deputy Superintendent Rodriguez so perceived the memo and refused to act on it, telling Director Gall " that as a manager he has got to go back and reflect on things not out of anger but as a manager."

It is also clear that after the events of February 7-10, the working relationship between Director Gall and Sergeant Considine deteriorated beyond any hope of repair. Director Gall admitted that thereafter, he viewed it as a "lost cause" to ask Sergeant Considine questions or to give him assignments. Director Gall began criticizing Sergeant Considine to his superiors and two months later, withdrew his request that Sergeant Considine be promoted. Perhaps most important, Director Gall testified that for three or four months preceding his September request for Sergeant Considine's transfer, he excluded Sergeant Considine from supervisory meetings in the Crime Laboratory, meetings in which Sergeant Considine's rank clearly entitled him to participate. Despite the fact that the actual transfer did not take place until September, it is evident that for months before that, Sergeant Considine was, as he himself described it, a "non-person" in the Crime Laboratory.

While even a summary recital of the evidence makes clear that Sergeant Considine has a substantial case and may well prevail on the merits at trial, there are some countervailing factors. Deputy Superintendent Rodriguez testified that he was not surprised when he received Director Gall's February 10 memo because "he anticipated a problem down there in December of 1983." (Rodriguez, May 10, 113.) He explained that when newly appointed Director Gall indicated that he wanted to keep Sergeant Considine

in the Crime Laboratory, his reaction was negative:

> I indicated to him that I thought it was inadvisable. I thought it was inadvisable from, first of all, on a standpoint of possible friction. I thought it was inadvisable personally for Marshall Considine because we have a situation here where he was the director of the crime laboratory and, you know, almost overnight he would be assuming a position subordinate to the director of the crime laboratory.
>
> Director Gall indicated that he thought these things could be overcome. He indicated that he felt that Marshall Considine's presence would provide some type of constancy to his new administration, to his new administration at the crime laboratory.
>
> I felt that Marshall Considine's longstanding involvement as a supervisor in the crime laboratory, the rapport that he had developed among the people that were working there, was very important—it was very important to Marshall Considine's—his approach, his philosophy of running the crime lab, which I kind of identified as a facilitating type of approach. And I still felt that it was ill advised. And I was really concerned as to whether it was an appropriate decision.
>
> However, Paul Gall was new to me in December of 1983. There was this possibility that perhaps Marshall Considine could overcome what

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> I thought were some impediments. That possibly—again our goals are to get the things done and to accomplish the goals of the Department. And I let him go ahead with the request.

(Rodriguez, May 10, 121-22.)

Moreover, the testimony of plaintiff Considine and defendant Gall suggests to this court that even before February 7, 1984, they were not adjusting well to one another's "style." Sergeant Considine testified that on numerous occasions, beginning as early as their first lunch together, he asked Director Gall to clarify his duties. Director Gall, as far as this court can tell, never did so. At the outset Director Gall was overwhelmed by his new duties and insufficiently understood what had to be done to make reasonable and focused delegation decisions. (Gall, May 22, 72.) Moreover, his view of the functions Sergeant Considine might serve was both expansive and imprecise. He hoped Sergeant Considine would be "sort of a Director Emeritus," and he "wanted his input on mostly anything." (Gall, May 22, 76.) Meanwhile, Sergeant Considine, after numerous attempts to have Director Gall give him some directions, occupied himself primarily with work he himself found to do, work of which Director Gall was ignorant or which he viewed as inconsequential.

Having observed the demeanor of the two men as witnesses and their obvious difference in manner and management philsophy and style, the court does not believe that the conflicts that developed between them can be blamed entirely on Director Gall's reaction to the *Auriemma* lawsuit. The court's impression is that Director Gall, virtually overwhelmed by the demands of his new position, wanted Sergeant Considine to act as his general aide and assistant, but that, because Director Gall's inability to delegate

definitively and various differences in personality and working style between the two men, the two had not, by February, achieved a modus vivendi. It appears to this court that the lawsuit was simply an additional irritant—albeit a significant one—in an already diffficult situation. While the court finds that plaintiff presented adequate prima facie evidence that his transfer from the Crime Laboratory was in retaliation for his protected conduct, it also finds that the evidence went far toward satisfying the defendants' burden to show that the transfer would have occured regardless of the *Auriemma* suit. While the court believes there is a not insubstantial possibility that plaintiff will prevail on this issue at trial, the evidence is too close at this state to give rise to a firm finding of a likelihood of success.[8]

B. *The Detail to the Sixteenth District*

With respect to plaintiff's April 29 detail from his administrative post at police headquarters to a field assignment in the 16th Police District, the court finds that the evidence preponderates in plaintiff's favor and that, as the evidence stands now, plaintiff has shown a likelihood of success on the merits.

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8. Even if the court were to conclude that plaintiff satisfactorily demonstrated a likelihood of success on the merits, it would not be inclined to conclude that plaintiff should be reassigned to the Crime Laboratory pending trial on the merits. Director Gall and Sergeant Considine have never worked effectively together and are unlikely to be able to do so simply because the court orders defendants to reassign Sergeant Considine to the Crime Laboratory. In view of this court's conclusions concerning Sergeant Considine's subsequent reassignment to the field and the relief that it recommends respecting that reassignment, the court believes that the balance of relevant factors, including defendants' and the public interest, does not require that Sergeant Considine be placed in a position where he cannot be effectively utilized. Such relief may, of course, be appropriate after a full airing of this [copy illegible at this point].

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The court is influenced both by the manner in which the reassignment was brought about and by the inconsistent and generally unsatisfactory evidence presented concerning the way in which the decision to reassign plaintiff was made. In the court's view, this evidence strongly suggests that the ressignment was intended not only to be punitive but to look punitive and hence to demonstrate plaintiff's vulnerability to arbitrary and punitive treatment.

We begin with the uncontested evidence that this was plaintiff's second reassignment in a period of seven months and his third reassignment in slightly over a year, if his demotion is taken into account. Not only was the timing of the reassignment likely to be disruptive to plaintiff, who had previously served stably and with distinction in one career track for nearly 25 years, but the nature of the reassignments was such as could only have had a disruptive and humiliating impact on any officer's career. Plaintiff had not only been removed from his high-level supervisory position as Director, concerning which he may or may not have a cognizable complaint, but he had been uprooted from the Crime Laboratory, a specialized area in which he had spent virtually his entire professional life. Despite this major change, he performed extremely well in his Special Functions group assignment. With his reassignment to the 16th District, he was being moved again, out of administration into the field, another major change in his career. If this were not in itself disruptive enough, defendants chose to bring about the reassighment by means of a detail, declining to wait *two weeks* until the end of a police period so that plaintiff and his sending and receiving superiors could have ordinary and routine notice of the reassignment. The effect of the use of the detail mechanism here had the effect, as defendants knew or should have known it would, of "embarrassing" plaintiff in all senses of that word, that is,

to perplex, hinder, impede, impair, to involve in difficulties and to cause distress. Plaintiff's Special Functions group supervisor was not prepared to lose him; the Commander of the 16th District was not prepared to receive him. Since plaintiff was not consulted, warned or counselled, he neither understood what was happening nor why it was happening, nor could he explain to those who asked him (i.e., Captain Keating, Captain Jankowski) why he was being so precipitiously and unceremoniously moved.

Plaintiff did not have to be reassigned in this manner. It appears clear, not only from the direct testimony concerning how reassignments of supervisory personnel are normally brought about but also by the testimony of many officers who described their own career paths, that the reassignment of a sergeant, with no attempt to counsel or explain to him what is happening in advance, is unusual and contrary to most officers expectations of how the Police Department, when not acting punitively, accomplishes managerial changes. The manner in which plaintiff's reassignment was brought about had the effect of making him look vulnerable; the evidence established that defendants well knew that their action would so appear.

The only explanation given by defendants for use of the detail mechanism was First Deputy Jemillo's testimony that, once he realized that Sergeant Considine was in a "make-work" position, he felt that it would have been "wasteful" to let him remain in that position for the two weeks remaining in the police period. This explanation is not such as to inspire confidence in defendants' good faith, in view of the fact that the position had been held by a full-duty sergeant for at least three years and the further fact that there was no specific position Sergeant Considine was immediately needed to fill. Hence, there was no emergency. The only way waiting for the end of the police period could be counted

as "wasteful" would be if normal management practices, and the needs, expectations, reputation and standing of Sergeant Considine, were ignored. Defendants can be expected to have realized the kind of disruptive and embarrassing impact this manner of reassignment would have on plaintiff. Their decision to bring about the reassignment in the manner most likely to disrupt and embarrass plaintiff strongly suggests a punitive motivation.

There is a further reason why the use of the detail procedure was suspect in these circumstances. The evidence indicated that details are used to provide personnel to fill specific needs of the department, either on a temporary basis or because the department's budget makes a reassignment impossible. While there was some evidence that the detail mechanism has been used for the specific purpose of removing someone from a given assignment, the evidence indicated that this would likely occur only in a real emergency, where, for instance, the health of a member required his immediate reassignment. While the court understands that the detail mechanism exists to provide management with flexibility and that any listing of the situations in which details have been used in the past should not be treated as exhaustive, the evidence makes clear that the reorganization of a unit, such as the Special Functions group, so as to more efficiently deploy personnel, is not the kind of situation for which details are designed or for which they are typically used. This would appear to be a permanent rather than a temporary reassignment, brought about neither to fill a specific emergency need nor to relieve an emergency problem in the sending unit. The use of a detail here, considering the evidence on the usual purposes for which the detail procedure is used, is disturbing.

Moreover, there is no question but that defendants knew that

moving Sergeant Considine from an administrative post in headquarters to a field assignment would likely be viewed by him and by others as undesirable. One year earlier, First Deputy Jemilo testified, a sergeant similarly reassigned had resigned his position rather than go to the field.

Finally, the state of the evidence regarding how the decision was made to reassign plaintiff tends to support plaintiff's position that he was reassigned for punitive rather than neutral reasons.

First, the evidence was hopelessly inconsistent as to when First Deputy Jemilo realized that Sergeant Considine was in a "make-work" position. He testified that he had been familiar with the position for many years, but when asked why he had never sought to eliminate it while Sergeant Kehoe held it, he suggested that it was only in the week before April 29 that he actually realized how wasteful the position was. This testimony could be understood if there had been any evidence of an actual investigation or inquiry by First Deputy Jemilo in the period immediately preceding April 29. The evidence, however, proved the opposite. In the face of clear evidence that reassignments within the Patrol Division normally originate with Chief Keating or his subordinates and are approved by First Deputy Jemilo and Superintendent Rice, Sergeant Considine's reassignment was a top-down change, ordered by the First Deputy, requiring a reorganization of patrol Division administration, with *no* consultation with or input from the Chief of the Patrol Division or the personnel who supervised Sergeant Considine and knew what functions he was performing. Such an order, originating in the highest ranks of the Police Department, following upon no consultation with anyone in the Patrol Division, leaves the court at a loss to ascertain what input First Deputy Jemilo had in the week preceding April 29 that made him conclude that

Sergeant Considine had to be moved immediately. The preliminary evidence this court heard permits only one conclusion — that this was an ad hominem decision, motivated by a desire to move Sergeant Considine, not a neutral decision to reorganize the Special Functions group.

The court also finds troubling First Deputy Jemilo's reliance, in testifying, on job descriptions of the sergeants in the Special Functions group prepared by his subordinates to aid his testimony *after* he had ordered Sergeant Considine detailed to the field. The defendants' position was that the reassignment of Sergeant Considine was based on neutral criteria and would have taken place regardless of Sergeant Considine's participation in the *Auriemma* litigation. The defense position requires this court to find that First Deputy Jemilo had a good faith basis to believe that Sergeant Considine's position did not require a full-duty sergeant and that the two other Special Function group sergeants could do whatever work of Sergeant Considine's required the attention of a sergeant. If, as of April 29, two weeks before First Deputy Jemilo testified, he did not know with reasonable precision what the Special Functions group sergeants did, it is difficult to understand on what rationale he based his decision to move Sergeant Considine, particularly in light of the fact that he had no input from the Patrol Division. While the court does not find First Deputy Jemilo's reliance on these testimonial aids dispositive, it believes they are a circumstance worthy of consideration in evaluating the credibility of defendants' proffered justification for Sergeant Considine's precipitous reassignment.

It cannot be disputed that defendants are empowered to deploy personnel in any way they see fit, and that they had the power and the right to detail Sergeant Considine to the field. In addition, this reassignment was consistent with Superintendent

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Rice's general policy of attempting to strengthen the presence of the Patrol Division in the field. Nonetheless, it is well-established that "[a]n act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when take for a different reason, would have been proper." *Matzker v. Herr,* 748 F.2d 1142, 1150 (7th Cir. 1984). Plaintiff has adequately shown that he was singled out for an undesireable reassignment by individuals responsible for his demotion and aware of his lawsuit challenging it. He has also satisfactorily shown that the manner in which his reassignment was carried out deviated from ordinary practice in ways which appear to have been punitive, which appear to have been calculated to look punitive, and which had the clearly forseeable effect of humiliating plaintiff and disrupting his efforts to get his career back on track in the wake of his demotion. Defendants have failed in their attempt to show that plaintiff was reassigned for neutral reasons of that the manner of his reassignment comported with ordinary procedure. As one court has stated, "an inadequately explained adverse action is more likely than not based on impermissible factors." *Shaw v. Cassar,* 558 F.Supp. 303, 313 (E.D. Mich. 1983). Accordingly, the court concludes that plaintiff has carried his burden of showing a likelihood of success on the merits.

II. Irreparable Injury

Having determined that plaintiff has satisfied his threshold burden of demonstrating a likelihood of success on the merits, the court may now proceed to an evaluation of whether preliminary injunctive relief is justified by the harm plaintiff will suffer if he is not protected from further retaliatory acts *pendente lite.* Since the relief plaintiff requests, reinstatement to a position which defendants maintain does not require his services, is an

extraordinary remedy to impose prior to the full airing of these issues at a trial on the merits, plaintiff must make "a substantial showing of irreparable injury." *EEOC v. City of Janesville,* 630 F.2d 1254, 1259 (7th Cir. 1980). We think he has done so here.

The gravaman of plaintiff's complaint is that he is being compelled to pay an impermissible price for engaging in constitutionally-protected conduct. In such cases, it has been said that "irreparable injury is presumed." *Goodwin v. LaPolla,* 589 F.Supp. 1423, 1430 (N.D. N.Y. 1984). While it is true, as defendants point out, that plaintiff has not yet been silenced by defendants' allegedly retaliatory treatment of him, and that, to date, he has aggressively litigated every adverse employment action taken against him, we think that in the First Amendment area, it is sufficient for plaintiff to demonstrate that he is being subjected to treatment that would be likely to chill the exercise of constitutionally protected conduct in a person of reasonabel fortitude.[9] We believe plaintiff has adequately met this test, and we will not attempt to speculate on whether or not, if he were denied relief, he would continue aggressively to press his claims.

As the Seventh Circuit Court of Appeals stated in *McGill v. Board of Education,* 602 F.2d 774, 780 (7th Cir. 1979), "the threat of transfer" to a less desireable assignment or to one that involves added difficulties or risks, can be "an effective means

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9. Plaintiff credibly testified that because of his age and his long years of service with the Police Department, he realizes that his career is near its end and that, accordingly, he is less intimidated by the fear of retaliation than he would have been at an earlier stage in his career. He testified in addition that the fear of retaliation directed toward others more vulnerable than he is has inhibited him from associating with some old friends and colleagues in the Police Department. (Considine, May 22, 44, 179-80.)

of chilling constitutionally protected speech." Plaintiff has clearly demonstrated that his frequent reassignments, to less desireable positions, involving duties unrelated to his training or experience, with no counselling or even reasonable notice, have created a highly stressful situation, have caused a significant impediment to plaintiff's ability to perform his duties with the efficiency and effectiveness his record indicates he typically demands on himself, have embarrassed him in the eyes of his colleagues and have disrupted his career in a significant way. These factors, coupled with the clear and present threat to the exercise of his First Amendment rights discussed above, constitute a sufficient showing of irreparable injury for which there is no adequate remedy at law.

III. The Balancing of Harms and the Public Interest

Two additional issues must be addressed. First, to be entitled to a preliminary injunction, plaintiff must show that the threatened injury to him outweighs the harm that defendants may suffer in the motion for a preliminary injunction is granted. Second, he must show that the issuance of a preliminary injunction will not disserve he public interest. In a case in which the plaintiff asserts that the injury threatened to him is a chilling effect on his First Amendment rights, and in which the requested injunction would affect no private interests but rather would have its impact on the conduct of a municipal police department, these issues are inextricably intertwined. Accordingly, they will be discussed together.

The threatened harm to plaintiff, as discussed more fully above, is that he will be deterred from the exercise of his constitutionally protected right to litigate his claims or that he will be compelled to pay an impermissible and injurious price for doing so. The threatened harm to the defendants if a

preliminary injunction is issued is that they will be prevented from deploying plaintiff as the free exercise of their discretion would dictage, with a possible attendant injurious effect on the efficiency and effectiveness of police services.

Clearly, there is a significant public interest, coterminous with defendants' interest here, in permitting local government to carry on its own affairs by and through its elected officials and those they appoint to carry out their policies, an interest that is seriously threatened by an injunction of the sort plaintiff requests. Accordingly, in deciding whether to issue a preliminary injunction, the court must give substantial weight to the interests of local government in governing. *See Wells v. Hutchinson,* 499 F.Supp. 174, 206 (E.D. Tex. 1980). This interest is entitled to even more weight when the agency of local government upon which the injunction will have its primary impact is the police department, since the safety and welfare of the community as a whole may be directly affected. The testimony at the hearing in this case made clear that sergeants are a commodity in short supply in the Chicago Police Depatment. The court should hesitate long and hard before entering an order that would limit or impede the Deparment's ability to deploy a sergeant in a manner which the Department's supervisory pesonnel view as most likely to promote the safety and well-being of the community. *See generally Wilson v. Taylor,* 658 F.2d 1021, 1027 (5th Cir. 1981). As indicated above, the court is cognizant of the fact that Superintendent Rice is committed to the depolyment of additional officers, including supervisory officers, to the field, and Sergeant Considine asks this court to prevent his deployment in that manner.

Were this simply a case of plaintiff's First Amendment rights set against the interest of the public in the most efficient conduct of the police depatment, the court might decline to grant a

preliminary injunction since, however the parties' relative harms are balanced, and adverse impact on the public interest would result, and the public interest, according to the standards for a preliminary injunction set out above, is not subject to balancing. The public interest as revealed by the evidence in this case, however, is more complex and more multifaceted than that. It is, for instance, not clear that the manner in which Sergeant Considine has been treated is consistent with the public interest in efficient police management. Indeed, the testimony of many credible witnesses established that the manner in which Sergeant Considine was treated was not consistent with good police management practices.

Further, and more importantly, there are significant public interests at stake here that weigh heavily *in favor of* the preliminary injunction plaintiff seeks. The public interest in the full and fair litigation of the issues raised by the *Auriemma* litigation is substantial. Numerous cases have recognized that patronage demotions as are alleged in the *Auriemma* complaint may have a significant deleterious impact on the functioning of public agencies. *See generally Elrod v. Burns,* 427 U.S. 347, 364-67 (1976). And whether that is as a practical matter true or not, the public interest in the airing of such issues is significant. As the Supreme Court stated in *Connick v. Myers,* 461 U.S. 138, 149 (1983), "[W]e believe it [is] apparent that the issue of whether [public empolyees] are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal."

It is, of course, not only Sergeant Considine's rights that are at stake here. There is nothing that emerged more clearly from this hearing than the fact that to many in the police department, including high-ranking officers not demoted by Superintendent

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Rice and not parties to the *Auriemma* litigation, what has happened to Sergeant Considine looks like a show of punitive political muscle. The gallows humor of co-workers[10] may not prove that plaintiff's reassignments were retaliatory, but they certainly indicate that they *looked* retaliatory. In view of such evidence, we must be heedful of the impact the treatment of Sergeant Considine might have on the willingness of others in the Police Department to exercise their First Amendment rights. In such a situation, we think that the public interest itself requires that the court act to vindicate the First Amendment rights at stake. *See Kuhlmann v. Bloomfield Township,* 521 F.Supp. 1242, 1245 (E.D. Wis. 1981)

CONCLUSION

Accordingly, it is the recommendation of this court that plaintiff's motion for a preliminary injunction be granted, that defendants be enjoined from detailing plaintff to the 16th Police District and that plaintiff be restored to his position in the Special Function group or to a comparable administrative position. The court further recommends that within 14 days of the date hereof, unless the district court extends the time, the parties submit a draft order that would prohibit the reassignment of Sergeant Considine pending trial on the merits absent reasonable advance notice and a showing by defendants, if plaintiff so requests, that the reassignment is not based on retaliatory motives.

Counsel are given ten days from the date hereof to file exceptions to this Report and Recommendation with the Honorable James F. Holderman.

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10. See testimony of James Doran, May 15, at 7-8; William Sherlock, May 15, at 11-13.

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Dated: September 20, 1985

Respectfully submitted,

JOAN B. GOTTSCHALL
United States Magistrate

APPENDIX D — RULING OF JUDGE HOLDERMAN ON DEFENDANTS' FIRST MOTION FOR SUMMARY JUDGMENT: ORDER DATED FEBRUARY 26, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 84 C 1224

JOHN AURIEMMA, DANIEL COLL, MARSHALL CONSIDINE, RENALDO COZZI, KENNETH CURIN, RUSSELL DITUSA, THOMAS FARAGOI, LAWRENCE FORBERG, JOHN HINCHY, KATHRYN KAJARI, GEORGE MARCIN, PATRICK MCDONOUGH, WALTER MURPHY, JOHN RAFTER, DOMINIC RIZZI, JAMES STAMPNICK, THOMAS WALTON and ROGER WHALEN,

Plaintiffs,

v.

CITY OF CHICAGO, HAROLD WASHINGTON, CHICAGO POLICE DEPARTMENT, and FRED RICE,

Defendants.

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

Plaintiffs brought this action against Chicago Superintendent of Police Fred Rice, Mayor Washington, the Chicago Police Department ("CPD") and the City of Chicago. Plaintiffs challenge their demotions, in December 1983, from high-ranking positions

in the CPD. Plaintiffs amended their complaint in 1985 to also challenge defendants' allegedly retaliatory acts.

In Count One of plaintiffs' second amended complaint, plaintiffs allege that defendants violated Due Process and Section 1983 by demoting plaintiffs without cause and without hearings. In Count Two, plaintiffs allege that defendants violated the First Amendment and Section 1983 by demoting plaintiffs as punishment for their failure to support Mayor Washington in his mayoral campaign. In Count Three plaintiffs allege that defendants violated the Equal Protection Clause and Sections 1981 and 1983 by demoting plaintiffs for racial reasons. In Count Four plaintiffs allege that defendants violated Section 1985(3) by conspiring to violate plaintiffs' civil rights. In Count Five plaintiffs allege that defendants violated the First Amendment, the Fourteenth Amendment and Section 1983 by retaliating against plaintiffs for their initiation of this lawsuit.

Plaintiffs seek (1) a declaratory judgment; (2) a permanent injunction ordering defendants to reinstate plaintiffs and to stop any illegal practices; (3) compensatory and punitive damages; and (4) attorneys fees and costs.

In October, 1984 Judge Aspen denied defendants' motion to dismiss. Before the court is defendants' motion for summary judgment.

FACTS

Plaintiffs dispute many of the facts underlying this lawsuit. They agree, however, on the following facts.

Plaintiffs held positions in the senior executive service ranks

of the CPD. By city ordinance, members of the senior executive service (the "exempt ranks") are exempt from the career service and from its protections against discharge. *See* Municipal Code of Chicago, ch. 25, ¶ 25.1-3(7)-(13) (1986). No city ordinance or personnel rule protects members of the senior executive service from discipline/discharge without "cause."

In 1983 Mayor Washington appointed Fred Rice as Superintendent of Police. Shortly thereafter, Rice demoted each of the plaintiffs from their positions in the exempt ranks. Rice did not provide plaintiffs with discharge hearings. Nor did Rice claim that plaintiffs' work performance had been deficient.

In February, 1984 plaintiffs filed this lawsuit. Plaintiffs claim that, since that time, Superintendent Rice, Mayor Washington, the City of Chicago and the CPD have subjected plaintiffs to a pattern of harassment and retaliatory treatment.

DISCUSSION

Summary judgment is appropriate only if the parties' evidentiary materials show that there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c). To avoid summary judgment, the non-movant plaintiff must make a showing sufficient to establish the existence of each element essential to his case on which he bears the burden of proof. *Celotex Corp. v. Catrett,* 106 S.Ct. 2548, 2553 (1986).

I. *Plaintiffs Forberg and Murphy*

Forberg and Murphy have not presented any evidence in response to defendants' motion for summary judgment. Plaintiffs cannot rely on the allegations in their pleadings. *Posey v. Skyline*

Corp., 702 F.2d 102, 105 (7th Cir.) *cert. denied,* 464 U.S. 960 (1983). This court, therefore, grants summary judgment in defendants' favor against Forberg and Murphy in the case.

II. *Due Process Claims*

The City argues that plaintiffs have not shown a property interest in their jobs because no state statute or city ordinance provides that members of the exempt ranks may be dismissed only for cause. While career service employees can be discharged only for cause, plaintiffs' positions are exempted from the career service. Mun. Code of Chicago, ch. 25, ¶ 25.1-5(12), 25.1-6. No ordinance or statute restricts the Superintendent's discretion to discharge non-career service ("exempt") employees.

A public employee can also acquire a property interest in continued employment from state statutes or from "mutually explicit understandings" between his employer and himself. *Perry v. Sindermann,* 408 U.S. 593 (1972). In the present case, plaintiffs argue that the City customarily demoted members of the senior executive service only for cause. Such a custom, if it existed, would not be inconsistent with city ordinances. *Cf. Shlay v. James Montgomery, et al.,* 802 F.2d 918 (7th Cir. 1986).

Plaintiffs have raised a genuine issue as to whether the City customarily demoted senior executive employees only for cause. Several plaintiffs described incidents in which predecessors of Superintendent Rice demoted particular exempt officers after "counselling" them as to their work deficiencies. While this evidence does not show a custom of requiring cause—if it did, a city could not discharge obviously poor employees without bestowing a property interest on all other employees—this evidence does not stand alone. Former Superintendent of Police Brzecek

testified that, when he was Superintendent, he demoted exempt officers only after evaluating their job performance. In addition, many of the plaintiffs testified that the exempt officers understood that they could not be demoted without cause. In sum, plaintiffs' evidence is sufficient to raise a genuine issue as to whether the City customarily demoted exempt officers only for cause.

III. *First Amendment Claim*

Plaintiffs' First Amendment claims survive defendants' motion for summary judgment. Plaintiffs have presented evidence from which a jury could infer that (1) political considerations were a substantial factor in defendants' decision to demote plaintiffs and that (2) plaintiffs do not occupy policymaking positions. *See Perry v. Larson*, 794 F.2d 279 (7th Cir. 1986). For example, plaintiff Kathryn Kajari testified that defendant Rice, when notifying her of her demotion, stated that "it's nothing you have done. The woman that's going to replace you has some really heavy ties over to City Hall."

The other plaintiffs' evidence of political motivation is considerably weaker than that presented by Ms. Kajari. Nonetheless, this court is reluctant to decide a disputed issue of motivation on a motion for summary judgment. *See Knapp v. Whitaker*, 757 F.2d 827 (7th Cir. 1985).

The parties also dispute the question whether plaintiffs occupied "confidential" or "policymaking" positions. Because this question is both material and factual, *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1984), it also precludes summary judgment.

Appendix D

IV. *Race Discrimination Claims*

Plaintiffs' race discrimination claims survive defendants' motion for summary judgment. Plaintiffs have presented evidence from which a jury could infer that defendants intentionally discriminated against plaintiffs on the basis of race.

According to plaintiffs, on December 3, 1983 defendant Rice demoted 26 white officers, one Hispanic and no black officers from the exempt ranks. Michael Holewinski, administrative assistant to the Mayor, testified that he discussed the racial makeup of the exempt ranks with the Mayor just prior to Rice's making the demotions. Plaintiff McDonough testified that at his demotion interview, Rice stated that McDonough had done a "good job" but that "it's the numbers game." Finally, plaintiffs submitted a chart which Rice allegedly used in making his decision to demote plaintiffs. The chart contains the notation "white" beside the names of certain police officers. Cumulatively, the above evidence suffices to support an inference that defendants demoted plaintiffs because of their race.

V. *Conspiracy Claims*

Plaintiffs' Section 1985(3) claims also survive defendants' motion for summary judgment. Plaintiffs have raised a genuine issue as to each element of a Section 1985(3) claim: (1) a conspiracy; (2) a purpose to deprive plaintiffs of the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) injury. *See, Quinones v. Szorc,* 771 F.2d 289 (7th Cir. 1985).

According to plaintiffs' deposition testimony, in November of 1983, Ed Bishop, Superintendent Rice's executive assistant,

requested research from the Legal Affairs Office of the CPD as to the effect of *Shakman v. Democratic Organization of Cook County,* 569 F.Supp. 177 (N.D. Ill. 1983) on the Superintendent's discretion to hire and fire police officers. Bishop told a Legal Affairs officer, Russell Luchtenberg, that Superintendent Rice could replace police officers for any reason. Luchtenberg testified that Bishop discussed racial and political hiring and firing with him and asserted that Superintendent Rice could replace white officers with less competent blacks. According to Luchtenberg, after Luchtenberg gave his *Shakman* memo to Bishop, Bishop stated that "it was too late, the Superintendent had already talked to the hall, he was going to do what he was going to do and they would justify his actions at a later time."

Plaintiffs also presented evidence that (1) Micheal Holewinski, the Mayor's administrative assistant, met with Superintendent Rice prior to the December 1983 demotions and (2) they discussed the racial composition of the exempt ranks. Many of the plaintiffs' replacements supported Mayor Washington in his mayoral campaign. Finally, plaintiff Kajari testified that in her demotion interview Superintendent Rice told her that she had performed well, but that her replacement had "really heavy ties over to City Hall." Cumulatively, this evidence raises a genuine issue as to whether Superintendent Rice conspired with the other defendants to deprive plaintiffs of the equal protection of the laws.

VI. *Retaliation Claims*

To survive defendants' motion for summary judgment, plaintiffs must present evidence that plaintiffs' involvement in the *Auriemma* litigation motivated defendants to take adverse action against plaintiffs. While some plaintiffs have presented sufficient evidence on their retaliation claims to survive summary

judgment, most have not.

The following plaintiffs have not presented any evidence, specifically pertaining to them,[1] of retaliation: John Hinchy, George Marcin, Patrick McDonough, Dominic Rizzi, Renaldo Cozzi, Russell Ditusa and Kathryn Kajari. While Curin, Rafter and Hinchy claimed in affidavits that defendants had investigated and harassed "all plaintiffs," these general allegations would not alone support a jury verdict in favor of the above plaintiffs. And Hinchy, Marcin, McDonough, Rizzi, Cozzi, Ditusa and Kajari did not present additional evidence of retaliation. In resisting summary judgment, plaintiffs cannot merely rest on allegations in their complaint. *Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir.) *cert. denied*, 464 U.S. 960 (1983).

Plaintiff Faragoi did not present sufficient evidence that defendants retaliated against him. Faragoi submitted only a transcript of a March, 1986 state court proceeding in which Faragoi was acquitted of battery. This evidence does not establish that defendants initiated the criminal proceeding against Faragoi in order to harass him; the complaining witness in the proceeding (a non-police officer) obviously believed that Faragoi had used excessive force in the underlying incident. Faragoi has not presented any evidence that the CPD proceeded with a baseless investigation of Faragoi in order to punish him for his involvement in *Auriemma*.

The retaliation claims of John Auriemma, Daniel Coll and Kenneth Curin cannot survive summary judgment. Auriemma, Coll and Curin alleged in their complaints that they were forced

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1. Several plaintiffs—Auriemma and Hinchy—conceded in their depositions

that they had not suffered any retaliation.

to retire in order to avoid retaliatory treatment.[2] Auriemma testified that when Superintendent Rice notified him of his demotion in December of 1983, Auriemma announced that he was going to quit the police force. Plaintiffs filed this suit on February 2, 1984. Auriemma could not therefore have resigned in order to avoid retaliation related to the *Auriemma* litigation.

Plaintiff Coll did not present evidence either that he retired in order to avoid retaliation or that he ever suffered retaliation. He has not raised a genuine issue as to whether defendants retaliated against him for participating in this lawsuit. *See Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir.) *cert. denied*, 464 U.S. 960 (1983).

Plaintiff Curin submitted only one piece of evidence supporting his retaliation claim: an affidavit saying that, due to his fear of retaliation, he was considering retirement. Curin did not testify in his deposition to acts of retaliation. The bare allegation in Curin's affidavit is not sufficient to support an inference that he suffered retaliation or that he reasonably feared such retaliation.

Plaintiffs Rafter, Whalen, Considine, Walton and Calzaretta have presented sufficient evidence of retaliation to survive summary judgment. Rafter testified in his deposition that, since plaintiffs filed *Auriemma*, Superintendent Rice has not considered him for promotions and the Internal Affairs Division of the CPD has unfairly investigated him.

Whalen presented evidence that, since *Auriemma* began,

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2. Russell Ditusa and John Hinchy also alleged that they were forced to

retire in order to avoid retaliatory treatment. The court has already considered Ditusa's and Hinchy's retaliation claims, *supra.* defendants have unfairly denied him transfers and have unfairly investigated him. Considine presented evidence that the *Auriemma* litigation triggered the defendants' decision, in February 1984, to seek Considine's removal from the Crime Lab. Calzaretta testified that after he joined the *Auriemma* litigation in May, 1985, defendants denied his transfer requests. Walton testified that, after the *Auriemma* litigation began, two or three command officers asked Superintendent Rice to transfer Walton to their districts and Rice refused. While evidence that Rice twice bestowed commendations on Walton after *Auriemma* was filed undermines Walton's claim that Rice acted in retaliation when he denied Walton's transfers, this court will not decide this disputed issue of motivation on summary judgment.

Whether plaintiffs Rafter, Whalen, Considine, Walton and Calzaretta can establish that defendants retaliated against them for their involvement in this suit depends on the credibility of the various witnesses to and participants in the events underlying this lawsuit. This court finds only that the above-mentioned plaintiffs have raised a genuine issue of material fact as to their retaliation claims.

CONCLUSION

Defendants' motion for summary judgment is GRANTED as to all claims of plaintiffs Forberg and Murphy. Defendants' motion for summary judgment is GRANTED on Count V as to plaintiffs John Hinchy, George Marcin, Patrick McDonough, Dominic Rizzi, Renaldo Cozzi, Russell Ditusa, Kathryn Kajari, Thomas Faragoi, John Auriemma, Daniel Coll and Kenneth Curin. Defendants' motion for summary judgment is DENIED

as to all other plaintiffs and all other claims.

The parties are strongly encouraged to discuss settlement and report on the status thereof on March 13, 1987 at 11:00 a.m.

ENTER:

s/ James F. Holderman
JAMES F. HOLDERMAN
United States District Judge

DATED: February 26, 1987